Ng Chun Lin & Anor v Foo Lian Sin & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22-118 OF 1996
KANG HWEE GEE J
8 APRIL 2000

Contract *— Collateral contract — Construction of — Parties entered into separate contracts with a common third party — No privity of contract between parties — Whether collateral contract can be construed from contractual relationship common between parties*

Contract *— Mistake — Rectification — Mutual mistake — Mistake in conveyance of shop lots to two buyers — No privity of contract between buyers — Whether rectification of register document of title should be allowed — Specific Relief Act 1950 s 30*

The plaintiffs were the tenants of shop No 9. The defendants owned shop No 7 which adjoined shop No 9 and were also the tenants for shop No 11. The owner of shops No 9 and 11 was one Mr Yee Weng Thong ('Mr Yee'). According to Mr Yee, the first defendant approached him offering to buy over shop No 11 of which he was the tenant at the time and also the adjoining shop No 9 which was occupied by the plaintiffs. Mr Yee was willing to sell shop No 11 to the first defendant but in respect of shop No 9, he would offer it to the second plaintiff first. He would only sell shop No 9 to the first defendant if the second plaintiff would not buy it. The second plaintiff wanted to purchase shop No 9. Mr Yee then took the second plaintiff and the first defendant to see the solicitor and told the solicitor that shop No 9 was to be sold to the second plaintiff and shop No 11 to the first defendant. He gave the solicitor a photocopy of the title deed of the respective lot on which he had by error marked No 9 on the copy of the title deed No 6793/79 and No 11 on the title deed No 6792/79. The correct marking should have been the reverse — No 9 on title deed 6792/79 and No 11 on title deed 6793/79. The lands were subsequently conveyed to the plaintiffs and the defendants in the manner as they appear in the respective sales and purchase agreement with the plaintiffs becoming the registered proprietor of HS (D) KA 6793/79 and the defendants of HS (D) KA 6792/79. The plaintiffs discovered the mistake a few months later and commenced action seeking for the rectification of the mistake in the conveyance of the two lots of properties. The defendants however denied there was any mistake in the conveyance to him of Shop No 9. He insisted that the correct property had been registered in his favour — this notwithstanding that the sales and purchase agreement he entered into with the owner described the shop as No 11. The defendants also submitted that there was no privity of contract between them and the plaintiffs and that a rectification of the register document of title under s 30 of the Specific Relief Act 1950 can be made only in respect of mistakes common between two contracting parties.

Held:

(1) Having heard the parties, the court was convinced that there was a mistake in the conveyance of the shop lots to the respective

parties. The court also found that the mistake was mutual to the plaintiffs and the defendants at the time of the conclusion of the respective sales and purchase agreement in that the plaintiffs had indeed intended to purchase shop No 9 and the defendants shop No 11, although there was no direct contractual relationship between the plaintiffs and the defendants (see pp 92E–F, 93B–D).

(2) A collateral contract need not be constructed from the same parties to the main contract, but also where each has on his own contracted with a common third party. Based on authorities, it can be constructed from a contractual relationship which is common to both the parties. In the present case, the court found that there was a collateral contract between the plaintiffs and the defendant on the terms and conditions that provided that the plaintiff would purchase shop No 9, the defendant would purchase only shop No 11; and provided that the plaintiffs would not purchase shop No 9, the defendant would be at liberty to purchase shop No 9 (see p 96D–H).

(3) Although the plaintiffs had not communicated with the defendants before they decided to purchase shop No 9 and therefore it could not be said that the defendants had represented to him that if he did not buy up his own lot someone else would buy it, Mr Yee did make that representation and although he did not disclose the name of the defendants to the plaintiffs, it was clear at that instance that the defendants were his undisclosed principal (see p 97A–B).

(4) The inducement became obvious when the plaintiffs decided to purchase their lot after telling Mr Yee they needed time to consider. The consideration in this case would be provided by the contract that each party entered into with Mr Yee subsequently to purchase the respective lot (see p 97B–C).

(5) Having established the existence of the collateral contract and a common mistake in the conveyance of the respective lots of properties, it follows that the plaintiffs were entitled to activate the provision of s 30 of the Specific Relief Act 1950 to rectify the respective entry in the register document of title to express in each case the true intent of the parties (see p 97D).

[Bahasa Malaysia summary

Plaintif-plaintif adalah penyewa kedai No 9. Defendan-defendan memiliki kedai No 7 yang bersebelahan dengan kedai No 9 dan juga merupakan penyewa kedai No 11. Pemilik kedai-kedai No 9 dan 11 adalah seorang bernama En Yee Weng Thong ('En Yee'). Menurut En Yee, defendan pertama telah menemuinya dengan tawaran untuk membeli kedai No 11 yang disewanya pada masa itu dan juga kedai No 9 bersebelahan yang diduduki oleh plaintif-plaintif. Encik Yee sudi menjual kedai No 11 kepada defendan pertama tetapi tentang

kedai No 9 pula, beliau akan menawarkannya kepada plaintif kedua dahulu. Beliau cuma akan menjual kedai No 9 kepada plaintif pertama sekiranya plaintif kedua tidak membelinya. Plaintif kedua ingin membeli kedai No 9. Encik Yee kemudiannya membawa plaintif kedua dan defendan pertama untuk berjumpa peguamcara dan memberitahu peguamcara bahawa kedai No 9 hendaklah dijual kepada plaintif kedua dan kedai No 11 kepada defendan pertama. Beliau telah memberi peguamcara sesalinan surat ikatan hakmilik lot masing-masing pada mana beliau dengan silapnya telah menandakan No 9 pada salinan surat ikatan hakmilik No 6793/79 dan No 11 pada surat ikatan hakmilik No 6792/79. Tanda yang betul sepatutnya No 9 pada surat ikatan hakmilik 6792/79 dan No 11 pada surat ikatan hakmilik 6793/79. Tanah tersebut kemudiannya disampaikan kepada plaintif-plaintif dan defendan mengikut perjanjian jual beli masing-masing dan plaintif-plaintif menjadi tuan punya berdaftar HS (D) KA 6793/79 manakala defendan-defendan memiliki HS (D) KA 6792/79. Plaintif-plaintif mendapat tahu tentang kesilapan beberapa bulan selepas itu dan memulakan tindakan meminta pembetulan kesilapan dalam penyampaian dua lot hartanah tersebut. Namun demikian, defendan menafikan terdapat sebarang kesilapan dalam penyampaian kedai No 9 kepadanya. Beliau menegaskan bahawa hartanah yang betul telah didaftarkan dalam namanya, tanpa menmpedulikan bahawa perjanjian jual-beli yang diikatnya dengan pemilik menyifatkan kedai tersebut sebagai No 11. Defendan juga berhujah bahawa tidak terdapat priviti kontrak di antara mereka dan plaintif-plaintif dan bahawa pembetulan dokumen hakmilik pendaftaran di bawah s 30 Akta Relief Spesifik 1950 hanya boleh dibuat berhubung dengan kesilapan yang biasa di antara dua pihak yang mengikat kontrak.

Diputuskan:

(1) Setelah mendengar pihak-pihak, mahkamah yakin bahawa telah berlaku kesilapan dalam penyampaian lot kedai kepada setiap pihak. Mahkamah juga mendapati bahawa kesilapan tersebut adalah bersalingan (mutual) kepada plaintif-plaintif dan defendan-defendan semasa pencapaian perjanjian jual-beli masing-masing dalam ertikata bahawa plaintif-plaintif memang berhasrat untuk membeli kedai No 9 dan defendan-defendan kedai No 11, walaupun tidak wujudnya perhubungan kontraktual secara langsung di antara plaintif-plaintif dan defendan-defendan (lihat ms 92E–F, 93B–D).

(2) Kontrak kolateral tidak perlu dibentuk dari pihak yang sama kepada kontrak utama, tetapi juga di mana setiap pihak sendiri telah mengikat kontrak dengan pihak ketiga yang sama. Berdasarkan authoriti, ia boleh dibentuk daripada perhubungan kontraktual yang biasa kepada kedua-dua pihak. Dalam kes ini, mahkamah mendapati bahawa suatu kontrak kolateral wujud di antara plaintif-plaintif dan defendan atas terma dan syarat yang

memperuntukkan bahawa plaintif akan membeli kedai No 9, defendan akan membeli kedai No 11 sahaja dan dengan syarat bahawa jika plaintif-plaintif tidak akan membeli kedai No 9, defendan akan bebas membeli kedai No 9 (lihat ms 96D–H).

(3) Walaupun plaintif-plaintif tidak menghubungi defendan-defendan sebelum mereka membuat keputusan untuk membeli kedai No 9 dan dengan itu ia tidak boleh dikatakan bahawa defendan-defendan telah membuat representasi kepadanya bahawa sekiranya ia tidak membeli keseluruhan lot orang lain akan membelinya, En Yee memang telah membuat representasi tersebut dan walaupun beliau tidak mendedahkan nama defendan-defendan kepada plaintif-plaintif, adalah jelas bahawa defendan-defendan adalah prinsipal bagi pihaknya yang tidak dimaklumkan (lihat ms 97A–B).

(4) Dorongan menjadi jelas apabila plaintif-plaintif membuat keputusan untuk membeli lot mereka selepas memberitahu Encik Yee mereka memerlukan masa untuk mempertimbangkannya. Pertimbangan dalam kes ini disediakan oleh kontrak yang diikat oleh setiap pihak dengan En Yee dengan berikutnya untuk membeli lot masing-masing (lihat ms 97B–C).

(5) Setelah membuktikan kewujudan kontrak kolateral dan kesilapan biasa dalam penyampaian lot hartanah masing-masing, ini bermaksud bahawa plaintif-plaintif berhak menggiatkan peruntukan s 30 Akta Relief Spesifik 1950 untuk membetulkan kemasukan masing-masing dalam dokumen hakmilik pendaftaran untuk menyatakan hasrat sebenar pihak-pihak dalam setiap kes (lihat ms 97D).]

Notes

For cases on collateral contracts generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1835–1837.

For a case on rectification due to mistakes, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2614.

Cases referred to

Clarke v The Earl of Dunraven and Mount-Earl [1897] AC 59 (refd)

Cooper v Phibbs (1867) LR 2 HL 149 (refd)

Craddock Brothers Ltd v Hunt [1923] 2 Ch 136 (refd)

Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 2 All ER 65 (refd)

Esso Petroleum Ltd v Customs and Excise Comrs [1976] 1 All ER 117 (refd)

Frederick E Rose (London) Ltd v William H Pim & JNR Co Ltd [1953] 2 QB 450 (refd)

Heilbut, Symons & Co v Buckleton [1913] AC 30 (refd)

Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd [1997] 1 CLJ Supp 488 (refd)

A *Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd* [1994] 4 CLJ 141 (refd)
Lovell and Christmas Ltd v Wall (1911) 104 LT 85, 88 (refd)
Oh Hiam & Ors v Tham Kong [1967] 1 MLJ 65 (refd)
Oh Hiam & Ors v Tham Kong [1980] 2 MLJ 159 (refd)
Rayfield v Hands [1958] 2 All ER 194 (refd)
B *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 All ER 471 (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

C **Legislation referred to**

Contracts Act 1950 s 21
Specific Relief Act 1950 s 30
Specific Relief Act 1963 s 26 [India]
National Land Code 1965 ss 340, 417

D *Ng Poh Tat* (*Ng Poh Tat & Co*) for the plaintiffs.
Yau Wai Leong (*Chan & Associates*) for the defendants.

Kang Hwee Gee J: This suit arose from the conveyance of two adjoining shop lots which the parties had purchased from a common seller.

E The plaintiffs contended that a common mistake had occurred in the conveyance of the respective land which had resulted in the defendants becoming the registered proprietor of the land on the shop purchased by the plaintiffs and the plaintiffs the registered proprietor of the land on the shop purchased by the defendants.

F It is common ground that before the sale of the properties:

(i) the second plaintiff was occupying the shop with the address No 9 Tingkat Kledang 14, Taman Kledang, 31450 Ipoh, Perak which stood *on land held under HS (D) KA 6792/79 PT 18177*, as a tenant of a company called Hung Chun Sdn Bhd. He operated a provision shop on this lot.

G (ii) the first defendant was occupying the shop with the address, No 11 Tingkat Kledang 14, Taman Kledang, 31450 Ipoh Perak which stood *on land held under HS (D) KA 6793/79 PT 18178*, also a tenant of Hung Chun Sdn Bhd.

(iii) the first defendant operated a mini market at their own shop at No 7 H Tingkat Kledang 14 which adjoined shop No 9.

The plaintiffs commenced this action seeking (in the translated form as it appears in the written submission of counsel for the plaintiffs):

(1) a declaration that the names of the plaintiffs as registered in the memorial of the registered document of title for land held under HS (D) KA 39024 I (formerly known as HS (D) KA 6793/79) for lot PT 18178, in the Mukim of Ulu Kinta, Perak (the first land) be cancelled by the Registrar of Land Titles Perak. And in turn their names be registered in the documents of title for land held under HS (D) KA 39023 (formerly

known as HS (D) KA 6792/79 for lot PT 18177, Mukim of Ulu Kinta, Perak (the second land); A

(2) a declaration that the names of the defendants as registered in the memorial of the registered document of titles for the second land be cancelled by the Registrar of Title and in turn their names be registered in the registered document of titles for the first land.

B

The two prayers appear to have suffered from inapt drafting. It is evident that one does not seek a declaration to cancel a memorial in the register document of title. Rather, the prayer should first seek a declaration that there was a mutual mistake in the conveyance of the two lots of properties which resulted in the incorrect memorial being entered in the register document of title and issue document of title with respect to the C proprietorship of the respective property — to be followed by an ancillary prayer for an order that the Registrar of Titles be directed to rectify the register and issue documents of title accordingly.

However, the intention of the plaintiffs in this suit is not incomprehensible and therefore not in vain. It is clear that they are seeking D the rectification of the mistake in the conveyance of the two lots of properties, the facts of which I shall now set out in greater detail.

How it all started

The Managing Director of Hung Chun Sdn Bhd (the landlord of shops E Nos 9 and 11) was a Mr Yee Weng Thong.

According to Mr Yee the first defendant approached him offering to buy over the shop No 11 of which he was the tenant at the time and also the adjoining shop No 9 which was occupied by the plaintiffs.

Mr Yee replied that he was willing to sell both the shops if the price was F right. But in respect of the shop No 9 which was being tenanted to the second plaintiff he told the first defendant that as a matter of principle he would have to offer it to the second plaintiff first. He would only sell shop No 9 to the first defendant if the second plaintiff would not buy it.

As it turned out the second plaintiff wanted to purchase the shop. Mr Yee then informed the first defendant of the second plaintiff's intention G and said that he could sell only shop No 11 to him. The other shop No 9 would have to be sold to the second plaintiff. The first defendant agreed.

Later he took both the second plaintiff and the first defendant to see the solicitor. He told the solicitor that shop No 9 was to be sold to the second plaintiff and shop No 11 to the first defendant. H

He gave the solicitor a photocopy of the title deed of the respective lot on which he had by error marked No 9 on the copy of the title deed No 6793/79 and No 11 on the title deed No 6792/79.

The correct marking should have been the reverse — No 9 on title deed 6792/79 and No 11 on title deed 6793/79. I

The signing of the agreement took place one or two weeks later at the solicitor's office. The solicitor explained to both the second plaintiff and the

first defendant the contents of the respective agreement which they subsequently proceeded to sign on.

Some six months later the first defendant came to see him to complain that he had been wrongly given the title deed for shop No 11 whereas he had actually purchased from him shop No 9. Mr Yee said he then tried to settle the matter amicably by requesting the parties to rectify the mistake through the solicitor. The defendants refused.

The upstairs portion of both the lots were let out to tenants before the sale. After the sale the plaintiffs collected rental from the tenant of shop No 9 and the defendants from the tenant of shop No 11, respectively as the new landlord.

At the office of the solicitors — Dato' Daniel Tay

The solicitor who prepared the sales and purchase agreement for the respective lot and subsequently conveyed them to the respective purchasers was one Dato' Daniel Tay.

He gave evidence that sometime before 11 May 1994, Mr Yee, the second plaintiff, and the first defendant visited him at his office for the purpose of the conveyance. On the instruction of all the three of them he was to convey shop No 9 to the plaintiffs and shop No 11 to the defendants.

He said he had explained to the first defendant in particular, that he was purchasing shop No 11.

Nevertheless without so much as admitting to any negligence or mistake on his part he said he relied on the markings in pencil made by Mr Yee on the respective photocopy of the title deed designating No 9 to the second defendant and No 11 to the first plaintiff which the latter had handed to him, to prepare the respective sales and purchase agreement on the basis that:

(i) the plaintiffs would be purchasing shop No 9 on land held under HS (D) KA 6793/79 PT 18178 .

(ii) the defendants would be purchasing shop No 11 on land held under HS (D) KA 6792/79 PT 18177.

The lands were subsequently conveyed to the plaintiffs and the defendants in the manner as they appear in the respective sales and purchase agreement with the plaintiff becoming the registered proprietor of HS (D) KA 6793/79 PT 18178 and the defendants of HS (D) KA 6792/79 PT 18177 in the issue document of titles and the register document of title at the land office.

Some months later — the disagreement

According to the second plaintiff, Lim Lian Tiam, he had all along since 1983 been occupying shop No 9 where he operated his sundry shop as a tenant of the Hung Chun Sdn Bhd, the company of which Mr Yee was a director.

Mr Yee went to see him one day to ask him whether he was interested to purchase the shop he was occupying telling him that if he did not want to buy it, someone else would want to buy it. He admitted in cross-examination that Mr Yee did not disclose to him at the time that the first defendant was the person who wanted to buy the lot. He told Mr Yee he needed time to consider and finally when he decided to buy it, he went over to see Mr Yee to inform him that he would be buying shop No 9 jointly with the first plaintiff.

Subsequently, on 13 May 1994 he, the first defendant and Mr Yee went to the solicitor's office to sign the sales and purchase agreement. At that office Mr Yee handed over two photostat copies of the title deeds and informed the solicitor that shop No 9 was to be sold to him and shop No 11 to the first defendant.

Five or six months later, he realized there was a mistake in the conveyance of the respective lot when he received a notice of assessment from the City Council for shop No 11 instead of for shop No 9 which he had purchased.

After the purchase he had bought fire insurance for his lot and had been collecting rental of RM200 per month from the tenant who occupied the upstairs portion of the shop.

The first defendant however denied there was any mistake in the conveyance to him of shop No 9. He insisted that the correct property had been registered in his favour — this notwithstanding that the sales and purchase agreement he entered into with the owner described the shop as No 11.

He said he had operated his mini market business on shop No 7 which he owned and had all along wanted to purchase the adjoining shop No 9 in order to expand his mini market business. In April 1994, he went to look for Mr Yee Weng Thong and offered to buy shop No 9 (the shop on which the second plaintiff was a tenant) as well as shop No 11 (the shop on which he was a tenant).

He said Mr Yee agreed to sell the two lots to him for the price of RM150,000 each but later informed him that he could only sell shop No 11 to him as he wanted to sell shop No 9 to the plaintiffs. He was unhappy and insisted on buying shop No 9 which was being occupied by the plaintiffs.

Mr Yee then agreed to sell shop No 9 to him at the price of RM156,000 saying he would sell shop No 11 to the first plaintiff at RM158,000 thereby affording him a discount of RM2000 for not being able to sell both the lots to him.

At the solicitor's office later, Mr Yee handed over the title deed to the solicitor Dato' Daniel and informed him that he wanted to sell shop No 9 to him. A photocopy of the deed was shown to him and no number was written on it. The second plaintiff was not there at the time. The solicitor explained to him clearly before he signed the sales and purchase agreement that the shop he was purchasing was shop No 9 which at the time he knew was being occupied by the plaintiffs. He said he raised the question of vacant possession of shop No 9 but the solicitor informed him that the

A transfer of the shop to him could be done only after obtaining the Menteri Besar's consent. In any case he had intended to obtain vacant possession of shop No 9 only after the Chinese New Year. This was because he had stocked a lot of soft drinks at shop No 11 and it would be inconvenient for him to vacate that shop to enable the plaintiffs to shift into.

B He claimed that he became aware of the error in the shop number in the sales and purchase agreement he signed with the seller some six months later when the second plaintiff came to see him to ask him to re-transfer shop No 9 to him. He had refused as he had bought the correct shop No 9.

Mr Yee had also advised him to pay the plaintiffs a compensation of RM2,000 so as to enable them to take possession of shop No 11 which the C plaintiffs were now occupying to which he had agreed.

He admitted that he had been collecting rent from the tenant who was occupying the upstairs portion of shop No 11 until April 1995.

The counterclaim

D The defendants have their own grievance. They are not prepared to leave the matter in status quo whereby the plaintiffs can continue to occupy the shop which they claimed they had rightfully purchased. They now seek by way of a counterclaim an order that the plaintiffs deliver up vacant possession and be liable in mense profit of RM1,000 per month until E possession is delivered up.

The law

Before proceeding to consider the evidence I shall for convenience consider the law which have to be applied in this case.

F An agreement entered into between the parties under a mutual mistake is void both at common law and equity in two categories of cases. The first category encompasses such cases where the subject matter of the contract without the knowledge of the parties did not exist or had ceased to exist at the time when they entered into the contract (res extincta). The second category consists of such analogous case where unknown to the buyer is G already the owner of that which the seller purports to sell him (res sua).

The contract has to be void in the first instance because there is nothing for the parties to enter into a contract if the subject matter is not in existence; and in the second instance because there is nothing for the seller to sell if the subject matter had already belonged to the buyer (see *Cheshire, Fifoot and Firmstone's Law of Contract* (2nd Singapore and Malaysian Ed) by H Andrew Phang Boon Leong (1998 Ed) on the chapter on unenforceable contracts at p 388).

This English common law principle of contract is grafted into s 21 of the Contracts Act 1950 which provides as follows:

I Agreement void where both parties are under a mistake as to the matter of fact

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation — An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

ILLUSTRATIONS

(a) A agrees to sell B a specific cargo of goods supposed to be on its way from England to Kelang. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

But where the subject matter of the contract was not res extincta or res sua, a party entering into a contract under a mutual mistake may avail himself of remedies in equity to apply to set aside the contract on such terms as are just (*Cooper v Phibbs* (1867) LR 2 HL 149). And where the common mistake is with respect to an entry in a document, the affected party may bring an action in equity to rectify the mistake in the document to reflect the real intention of the parties.

As Cozen Hardy MR said in *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85 at p 88:

> The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. It presupposes a prior contract and it requires proof that by common mistake the final completed instrument as executed fails to give proper effect to the prior contract. For this purpose evidence of what took place prior to the execution of the completed document is obviously admissible and indeed essential.

The extent to which the court would be prepared to order rectification is well illustrated in *Craddock Brothers Ltd v Hunt* [1923] 2 Ch 136 wherein by reason of a mutual mistake made in reducing a verbal agreement into writing of a sale of a property, a yard was mistakenly included in the formal and written instrument and was subsequently conveyed to the purchaser. Rectification of the conveyance was ordered in that case notwithstanding that it would result in the grant of specific performance in defiance of the rule that no parole evidence was admissible to vary the terms of a written contract.

In handing down the decision Warrington LJ went on to set out in detail (at p 159) the principle upon which rectification may be ordered in like cases:

> The jurisdiction of the courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying of giving effect to the whole of that contract by writing, and

A there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded upon it.

B

Here in our jurisdiction the principle is embodied in s 30 of the Specific Relief Act 1950 which provides as follows:

RECTIFICATION OF INSTRUMENTS

C When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as

D this can be done without prejudice to rights acquired by third persons in good faith and for value.

ILLUSTRATIONS

(a) *A*, intending to sell to *B* his house and one of three godowns adjacent to it, executes a conveyance prepared by *B*, in which, through *B*'s fraud, all three godowns are included. Of the two godowns, which were

E fraudulently included, *B* gives one to *C* and lets the other to *D* for a rent, neither *C* nor *D* having any knowledge of the fraud. The conveyance may, as against *B* and *C*, be rectified so as to exclude from it the godown given to *C*, but it cannot be rectified so as to affect *D*'s lease.

(b) By a marriage settlement, *A*, the father of *B*, the intended wife, covenants

F with *C*, the intended husband, to pay to *C*, his executors, administrators, and assigns, during *A*'s life, an annuity of $5,000. *C* dies insolvent and the official receiver claims the annuity from *A*. The court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for *B* and her children, may rectify the settlement and decree that the official receiver has no right to any part of the annuity.

G The parties in the instant case however, are not treading on unfamiliar ground. Although precedents with respect to the rectification of the register document of title that comes close to the factual matrix of the instant case are rare, the law had in fact been laid by PS Gill J (as he then was) some 30 years back in *Oh Hiam & Ors v Tham Kong* [1967] 1 MLJ 65.

H In that case the parties had entered into a contract for the sale and purchase of certain lands at Gombak but by a mistake common to both the parties the subsequent conveyance transferred not only the lands agreed to be sold to the buyer but also another piece of land in Setapak. The transfer was set aside in that case and rectification of the transfer made pursuant to the agreement was granted by ordering the defendant to re-transfer the

I Setapak land back to the plaintiff.

The judgment also set the law pertaining to the doctrine of indefeasibility under s 340 of the National Land Code (previously s 42 of

the FMS Land Code) by its ruling that the rules of equity pertaining to rectification apply to land registered under the National Land Code notwithstanding that the transferee enjoys indefeasibility of title under the section, thus settling the very issue raised by counsel for the defendants in the instant case.

The judgment of PS Gill J was reversed on appeal to the Federal Court but was affirmed both on findings of facts and law on further appeal to the Privy Council (see [1980] 2 MLJ 159).

Was there a common mistake?

The extent to which equity was prepared to lend its hand to rectify a document was considered by Denning LJ (as he then was) in *Frederick E Rose (London) Ltd v William H Pim & JNR Co Ltd* [1953] 2 QB 450 at p 461:

> In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, one does not look into the inner minds of the parties — into their intentions — any more than one does in the formation of any other contract. One looks at their outward acts, that is, at what they said or wrote to one another in coming to an agreement, and then compare it with the document which they have signed. If one can predicate with certainty what the contract was, and that it is, by a common mistake, wrongly expressed in the document, then one rectifies the document, but nothing less will suffice.

The above passage provides the template within which one could go about to consider the evidence in the instant case:

Having heard the parties, I am convinced that there was a mistake in the conveyance of the shop lots to the respective parties in spite of the insistence of the first defendant that he had intended to purchase shop No 9 and that Mr Yee had meant to sell to him only that lot.

I come to this conclusion because I believe Mr Yee whose account of the antecedent that led to the sale and purchase of the shops lends credence to the plaintiff's claim. I also believe Dato' Daniel who corroborated Mr Yee on this point. Needless to say both Mr Yee and Dato' Daniel were independent witnesses who had no reason to take any side.

On the other hand, the first defendant's claim that he had intended to purchase only shop No 9 is inconsistent with his inactivity immediately after the purchase. He had not as he would be expected to, taken any step to obtain vacant possession of shop No 9 which was being occupied by the plaintiffs. Neither did he take any step to move out of shop No 11 which he was occupying in order to allow the plaintiffs to occupy it.

His conduct after the purchase clearly shows that he had settled on the status quo before the respective purchase of the lots by the parties — with him occupying and remaining at shop No 11 and the plaintiffs remaining where they were at shop No 9 to continue to operate their provision shop. Even more telling is the fact that he had continued to collect rent from the

A tenant of the upstairs portion of shop No 11 well after the purchase, stopping only after April 1995 after the second plaintiff informed him of the discrepancy.

In the event and for the reasons aforesaid, I must so find that the respective land had been conveyed to the respective purchaser by mistake
B when the correct conveyance should have been as follows:

The land described as HS (D) KA 6792/79 PT 18177 to the plaintiffs.

The land described as HS (D) KA 6793/79 PT 18178 to the defendants.

I must also find for the same reasons that the mistake was mutual to the
C plaintiffs and the defendants at the time of the conclusion of the respective sales and purchase agreement in that the plaintiffs had indeed intended to purchase shop No 9 and the defendants shop No 11 — *although there was no direct contractual relationship between the plaintiffs and the defendants, a salient point of law raised by counsel for the defendants which I shall consider shortly.*

D *A question of privity*

It was submitted that the defendants did not have anything to do with the plaintiffs. His contractual relationship was exclusively with Mr Yee who represented his company in respect of the sale and purchase of his own shop lot and therefore there was no privity of contract less so a common mistake
E in the transaction. A rectification of the register document of title under s 30 of the Specific Relief Act 1950, he submitted, can be made only in respect of mistakes common between two contracting parties. He relied on the commentary from *The Law of Specific Relief* by Dr SC Banerjee (8th Ed, 1988) at p 413 with respect to s 26 of the Indian Specific Relief Act 1963 which was in para materia with s 30 of our Specific Relief Act 1950:
F

> 11 Representative-in-interest — The expression includes heirs, transferees, executors, administrators, official receivers, official assignees and committee in lunacy. Under this section, the court will interfere only as between the original contracting parties, or those claiming under them in privity ... Subsection (1) limits the operation of the section to either party
G of his representative-in-interest. So, rectification cannot be had by one who is neither a party to the contract nor instrument, nor the representative-in-interest of such a party.

Counsel for the plaintiffs on the other hand appears to have premised his argument on this issue on the locus standi of his clients to apply for a
H declaration they are now seeking. He relied chiefly on the ratio of Abdoolcader J (then co-opted as a member of the panel) in the Federal Court case of *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177 wherein at p 178 he said:

> Although it is not necessary for a plaintiff who seeks relief by way of declaratory) judgment to show that he has a present cause of action, 'he must
I be somebody with such an interest in the subject - matter of the action as to justify his seeking relief [*Wilson, Walton International (Offshore Services) Ltd v Tees & Hartlepools Port Authority* at p 124].

But locus standi and privity of contract are poles apart. Whereas locus standi establishes a party's right to appear and sue in a non-contractual cause of action, privity is concerned strictly with the rule that a non-party cannot bring an action against another in contract. The rule with respect to the rectification of instruments under s 30 of the Specific Reliefs Act 1950 is concerned with 'mutual mistakes of the parties' which could only arise between parties to a contract. It follows that unless the plaintiffs are able to establish in law that there is a contractual relationship with the defendants, a rectification of the register document of title of their property does not arise — an issue which I shall now consider.

Is there a contract between the plaintiffs and the defendants?

It can be readily appreciated that as between the plaintiffs and the defendants there was no visible agreement as such as they had in each case entered into a separate sales and purchase agreement with Hung Chun Sdn Bhd.

But the question whether a contract exists or not between parties has to be judged not by merely what the parties have outwardly intended, but also by what they have said, written or done. As Brian CJ said:

> ... the intent of a man cannot be tried, for the Devil himself knows not the intent of man (Anon 1477 YB 17 Edw 4, fo 1, p 12.)

To do justice, the courts may have to go beyond the immediate inferences that may be drawn from words and acts and may construct therefrom a contract between persons who would seem, at first sight not to be in contractual relationship with each other at all (see *Cheshire Fifoot & Firmstone Law of Contract* (12th Ed) — Constructing a contract at p 28).

Thus in *Clarke v The Earl of Dunraven and Mount-Earl* [1897] AC 59, the owners of two yachts entered them for the regatta of a yatch club. The rules of the club to which each of the owner had committed himself by letter to be bound obliged him to pay 'all damages' caused by fouling. In the course of the race the defendant fouled the plaintiff's yatch causing her to sink. Notwithstanding that there was no direct contractual relationship between the plaintiff and defendant, the plaintiff sued the defendant for damages contending that by entering the competition in accordance with the rules of the club a contract had been created between the competitors inter-se by which they had bound themselves to pay 'all damages'.

The question that subsequently went before the House of Lords was whether any contract had been made between the plaintiff and the defendant given that their immediate contractual relationship were not with themselves but with the yacht club on an individual basis. It held affirming the decision of the Court of Appeal, that a contract (collateral to the main one that had been entered with the yacht club by the participants including the plaintiff and the defendant) had been created between them as they have accepted the rules as binding upon them, and therefore the defendant was liable in damages.

A In *Shanklin Pier Ltd v Detel Products Ltd* [1951] 2 All ER 471, the plaintiff entered into a contract with a company to repair and repaint their pier. Under this contract the plaintiffs had the right to specify the materials to be used. The defendants induced the plaintiffs to use a particular paint made by them giving the plaintiff assurance of its quality. The company used the paint as specified with unsatisfactory result. On being sued by the B plaintiffs for breach of their undertaking, the defendants pleaded that there was no contract between the plaintiff and the defendants. It was held that there was a contract between the plaintiff and the defendant on the premise that the defendants had guaranteed the suitability of the paint in return for specifying that the defendants' paint be used by the company (see also C *Rayfield v Hands* [1958] 2 All ER 194; *Esso Petroleum Ltd v Customs and Excise Comrs* [1976] 1 All ER 117).

The principle in *Clarke v Dunraven* is now well established and has been applied and expanded in subsequent cases in England and other common law jurisdictions, including ours. Its scope could not have been better described and explained than in the judgment of Raja Azlan Shah CJ D Malaya (as he then was) in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 wherein a number of English judgments were cited in support. Of those that were considered by his Lordship, the speech of Lord Moulton in *Heilbut, Symons & Co v Buckleton* [1913] AC 30, at p 47 is of special relevance to the instant case. This was what he said:

E > It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.

F *Tan Swee Hoe* was applied in *Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd* [1994] 4 CLJ 141. In that case Siti Norma Yaacob J (as she then was) had to decide whether an oral representation to provide end financing could constitute a collateral contract that exists side by side with the main contract of providing a bridging finance to the plaintiff. In the course of her ruling that in that case that the representation amounted to a G collateral warranty it was held that for a collateral contract to exist, the plaintiffs must show: (i) that there must be a representation which was intended by the defendants to be relied upon; (2) the representation induced the signing of the contract; and (3) in the peculiarity of the facts in that case, the representation must amount to a warranty, existing side by H side with it.

A relevant aspect of the doctrine with respect to consideration in a collateral contract was also expressed in *Kah Seng Construction Sdn Bhd v Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 488 wherein Low Hop Bing J in holding that a collateral contract did not exist in that case said at p 454 that:

I > A collateral contract comes into existence prior to or at the time of the conclusion of the main contract. The consideration for the collateral contract is the making of the main contract.

A confined reading of the cases cited above however, may lead one to conclude that collateral contracts can be legitimately constructed by the courts only in cases where a warranty by one party had induced the other party to enter into a main contract. But the word warranty here merely typifies the conduct deemed sufficient by the courts to support a collateral contract. A collateral contract is founded basically on the representation that a party may have made to the other that may have induced him to enter into the main contract — an environment best described by Lord Denning MR in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, at p 67 in a passage which was also relied upon by the Federal Court in *Tan Swee Hoe* as follows:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

A collateral contract need not therefore be constructed from the same parties to the main contract, but also where each has on his own contracted with a common third party. As the two landmark cases of *Clarke v Dunraven* and *Shankling Pier* had shown, it can be constructed from a contractual relationship which is common to both the parties — in the former, the yatch club and in the latter the company employed to paint the pier.

Now to recall the antecedent that led to the signing of the sales and purchase agreements by the plaintiffs and the defendants at the office of the solicitor Dato' Daniel:

It is clear that the second plaintiff had agreed to purchase shop No 9 after being told by Mr Yee that the first defendant had wanted to purchase the same lot and that he was being offered the first option to purchase; and the first defendant had purchased only shop No 11 as the second plaintiff would be purchasing shop No 9.

From this reciprocal understanding and arrangement one can legitimately conceptualize a contract within the paradigm suggested by Lord Moulton in *Helbut, Symons & Co* in the following form:

> If you buy shop No 9, then I will buy only shop No 11; otherwise I will buy both shop No 9 and shop No 11,

and to construct a collateral contract between the second plaintiff and the first defendant on the following terms and conditions:

(i) provided that the plaintiff purchase shop No 9, the defendant would purchase only shop No 11; and

(ii) provided that the plaintiff would not purchase shop No 9, the defendant would be at liberty to purchase shop No 9.

The representation and inducement (in the sense described in *Kluang Wood Products* that led to the collateral contract is self-evident.

With respect to the representation, it is true the second plaintiff by his own admission, had not communicated with the first defendant before he decided to purchase shop No 9 and therefore it could not be said that the first defendant had represented to him that if he did not buy up his own lot someone else would buy it. But Mr Yee did make that representation and although he did not disclose the name of the first defendant to the second plaintiff it was clear at that instance that the first defendant was his undisclosed principal.

With respect to the inducement, this becomes obvious when the second plaintiff decided to purchase his lot after telling Mr Yee he needed time to consider.

The consideration in this case would be provided (following *Kah Seng Construction*) by the contract that each party entered into with Hung Chun Sdn Bhd subsequently to purchase the respective lot.

The order

Having established the existence of the collateral contract, and a common mistake in the conveyance of the respective lots of properties it follows that the plaintiffs are entitled to activate the provision of s 30 of the Specific Reliefs Act 1950 to rectify the respective entry in the register document of title to express in each case the true intent of the parties.

Let there be an order that the registrar or land administrator be directed under s 417 of the National Land Code 1965 to make the necessary rectification on the respective register document of title as well as on the issue document of title.

Let the counterclaim of the defendants be dismissed with costs.

Let the defendants pay the costs of this action.

Order accordingly.

Reported by Jafisah Jaafar